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7 DEANNE ECHEVARRIA, et al.,  
8 Plaintiffs,  
9 v.  
10 ACCENTCARE, INC., et al.,  
11 Defendants.

Case No. 15-cv-00676-EDL

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**ORDER REQUIRING FURTHER  
BRIEFING**

20 Plaintiffs filed this case in superior court on January 7, 2015. Defendants removed the  
21 case on February 12, 2015, and on February 19, 2015, Defendants filed a motion to compel  
22 arbitration. On March 5, 2015, Plaintiffs filed a Federal Rule of Civil Procedure 41(a) Notice of  
23 Voluntary Dismissal, and the Court's docket clerk closed the case based on the Rule 41(a) notice.  
24 Plaintiffs also filed a Demand for Arbitration with the American Arbitration Association.

25 On March 18, 2015, Defendants filed this administrative motion to clarify the status of the  
26 case. Defendants believe that this case should remain open and active because it could not have  
27 been closed without compliance with Federal Rule of Civil Procedure 23(e):

28 (e) Settlement, Voluntary Dismissal, or Compromise. The claims,  
29 issues, or defenses of a certified class may be settled, voluntarily  
30 dismissed, or compromised only with the court's approval. . . .

31 Fed. R. Civ. P. 23(e). A threshold question is whether Rule 23(e) applies to this pre-certification  
32 case.

33 On its face, the current Rule 23(e) applies only to certified classes. However, the prior  
34 version of the rule was not so limited and applied to "dismissal or compromise of a 'class action.'" The  
35 Ninth Circuit applied that previous version of Rule 23(e) to pre-certification classes, such as  
36 this one. Diaz v. Trust Territory of the Pacific Islands, 876 F.2d 1401 (9th Cir. 1989). Since Diaz  
37 and the 2003 amendment to Rule 23(e) clarifying that it applies to "certified classes," courts in this

1 district have expressed uncertainty about whether the Rule still applies to pre-certification  
2 settlements or dismissals, but have applied the Rule in that context. See Castro v. Zenith  
3 Acquisition Corp., 2007 WL 81905, at \*1 (N.D. Cal. Jan. 9, 2007) (pursuant to a proposed  
4 settlement and stipulation of dismissal, the court applied the Diaz factors pursuant to Rule 23(e) to  
5 determine whether dismissal was appropriate); Houston v. Cintas Corp., 2009 WL 921627, at \*1  
6 (N.D. Cal. Apr. 3, 2009) (“Although Rule 23(e) expressly refers to certified classes, before Rule  
7 23(e) was amended in 2003, the Ninth Circuit had held that the rule applied to pre-certification  
8 dismissals and compromises,” and “assuming without deciding that Rule 23 applies in this  
9 instance. . . .”); Mahan v. Trex Co., 2010 WL 4916417, at \*2 (N.D. Cal. Nov. 22, 2010) (in ruling  
10 on a motion to amend the complaint after some class claims were settled, the court applied the  
11 Diaz factors without deciding whether they applied to a pre-certification case); Lyons v. Bank of  
12 America, 2012 WL 5940846, at \*1 (N.D. Cal. Nov. 27, 2012) (stating that the Ninth Circuit  
13 extended the Rule 23(e) approval requirement to pre-certification cases, but noting the uncertainty  
14 within the district); Tombline v. Wells Fargo Bank, 2014 WL 5140048, at \*2 (N.D. Cal. Oct. 10,  
15 2014) (noting the uncertainty as to whether Rule 23(e) approval applies to pre-certification cases,  
16 but concluding that courts have “generally assumed that it does” apply). These cases arose in the  
17 context of settlements and stipulated dismissals, which may well pose a greater danger of harm to  
18 absent members of the putative class than under the circumstances here, where Plaintiffs dismissed  
19 the case with no agreement from Defendants, and continued to pursue the claims on behalf of the  
20 class through a demand for class arbitration. Therefore, it is even more unlikely that the Court’s  
21 approval is required to protect absent putative class members here.

22       Nonetheless, in light of the uncertainty, it is prudent for the Court to consider whether  
23 Plaintiffs’ involuntary dismissal was appropriate under Rule 23(e):

24       . . . the district court should inquire into possible prejudice from (1)  
25 class members’ possible reliance on the filing of the action if they  
26 are likely to know of it either because of publicity or other  
27 circumstances; (2) lack of adequate time for class members to file  
28 other actions, because of a rapidly approaching statute of  
limitations; (3) any settlement or concession of class interests made  
by the class representative or counsel in order to further their own  
interests.

1      Diaz, 876 F.2d at 1408. However, the Court lacks sufficient information to apply these factors.  
2      Therefore, Defendants shall file a brief, not to exceed five pages, no later than April 3, 2015,  
3      addressing the Diaz factors. Plaintiff may file a response, not to exceed five pages, no later than  
4      April 10, 2015. The Court will take this matter under submission and will inform the parties  
5      whether a hearing is necessary.

6      **IT IS SO ORDERED.**

7      Dated: March 26, 2015

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9      ELIZABETH D. LAPORTE  
10     United States Magistrate Judge

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United States District Court  
Northern District of California